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OFFICE OF PETITIONS

In re Application of
Terstappen, et al. :
Application No. 10/733,829 : DECISION ON
Filed: December 10, 2003 : PETITION
Attorney Docket No. IMMC 208.2 :
:

This is in response to the petition to revive under 37 CFR 1.137(a), filed November 4, 2004.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)," as appropriate. Extensions of time under 37 CFR 1.136(a) are permitted.

The above-identified application became abandoned for failure to timely submit corrected drawings as required by the Notice of Allowability mailed on June 23, 2004. This notice set a period for reply of three months. No extensions of time were permitted. No corrected drawings having been received, the above-identified application became abandoned on September 24, 2004. A Notice of Abandonment was mailed on October 27, 2004.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the

Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

Petitioner states that the failure to submit drawings stems from two reasons: (1) a clerical error on the part of an employee in misplacing the "section of the examiner's comment requiring formal drawings"; and (2) the lack of a backup system at the time. No backup system was in place because petitioner's firm was instituting a electronic backup system which required a period of debugging. In addition, the firm's lone paralegal left at the end of August.

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and (3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the due exercise of due care.³ Here petitioner has not provided a sufficient showing as to elements (1), (2) or (3).

As to element (1), it is not clear from the petition why the misplacing of the "section of the examiner's comment requiring formal drawings" resulted in the failure to timely submit corrected drawings. The requirement for corrected drawings was also checked off on the form page of the Notice of Allowability.

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ See MPEP 711.03(c)(III)(C)(2).

As to element (2), petitioner has not provided a full explanation of the firm's business routine with respect to docketing.

As to element (3), petitioner has not discussed the specifics of the training and experience of the employee who misplaced the paperwork pertaining to corrected drawings. In addition, while presumably it was the paralegal who misplaced the paperwork, petitioner does not state this in the petition. Clarification is needed.

Alternative Venue:

While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is **not** precluded from obtaining relief by filing a request for reconsideration pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m)⁴; (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and (4) Any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to paragraph (d) of this section.

Receipt of the \$110 fee for a petition under 37 CFR 1.137(a), and the corrected drawings submitted with the petition, is acknowledged.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

By FAX: (703) 872-9306
Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3207.



Cliff Congo
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Office of Petitions

⁴ Effective December 8, 2004, the fee for a petition to revive under 37 CFR 1.137(b) was increased to \$1,500.